United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,735, 21,568

364

LEWIS SWEETENBURG, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District
Court for the District of Columbia

August 22, 1968

ALFRED H. MOSES

CHRISTOPHER H. BUCKLEY, JR.

701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant
(Appointed by this Court)

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ISSUE PRESENTED FOR REVIEW

Was material evidence introduced by the Government at trial seized by the Metropolitan Police by means of an unlawful entry into defendant's apartment without announcement of authority and purpose, and did the trial court err in denying defendant's Motion to Suppress Evidence and defendant's Motion for New Trial based in part thereon.

With respect to this issue, Appellant invites this Court's attention to the following pages of the reporter's transcript of the pretrial hearing on his Motion to Suppress Evidence in Criminal No. 861-67: Tr. 4-10; 13-14; 22-30; 34-40; 45-46; 49; 51-52; 55. This Court's attention is invited to the following pages of the reporter's transcript of Appellant's trial in Criminal No. 861-67: Excerpt Tr. 2; Tr. 9-11; 13; 15-16; 18-19; 22-23; 31-35; 66-68; 84-93; 95; 102-105; 107-110; 112-113.

This case has not been previously before this Court.

STATEMENT OF THE CASE

Defendant was arrested early on the morning of April 27, 1967, and charged with Robbery (22 D.C.C. § 2901) and Assault with Dangerous Weapon (22 D.C.C. § 502). On July 12, 1967, defendant was indicted for

the alleged commission of these offenses.

Defendant is alleged to have committed robbery by taking $83.00, property of John Feather's Texaco Gas Station, Bladensburg Road, Northeast Washington, from the custody and possession of Herbert Alexander, a night gas station attendant at Feather's Texaco, as well as twelve gallons of gasoline from a Feather's Texaco pump, and to have assaulted Alexander with a dangerous weapon (a pistol) during the alleged commission of the robbery.

On October 13, 1967, a pretrial hearing was held on defendant's Motion to Suppress Evidence. The ground upon which this motion was based was defendant's allegation that officers of the Metropolitan Police Department had illegally entered his apartment on the morning of April 27, 1967, without announcing their authority and purpose, and thereafter had arrested defendant and seized material evidence presented in this case by the Government at trial.

At the pretrial hearing on defendant's Motion to Suppress Evidence, defendant called two witnesses who testified that the police entered defendant's apartment on the morning of April 27, 1967, without an announcement of their authority and purpose. The Government

called no witnesses to refute this testimony. The motion was denied (McGarraghy, J.) without a statement of reasons for the denial.

Defendant's case came on for trial on December 6, 1967, before Judge Corcoran in the United States District Court for the District of Columbia. Defendant's Motion to Suppress Evidence was renewed at this time and was denied without a hearing by Judge Corcoran solely on the basis of the prior denial by Judge McGarraghy. The Government called three witnesses at the trial. The first was the victim of the robbery, Herbert Alexander. The second was Grover Sharp, who had been called as a witness by defendant at the pretrial hearing on defendant's Motion to Suppress Evidence. The third witness was the arresting officer, Detective Raymond L. Ruffing of the Metropolitan Police Department. Defendant did not testify but called as a witness George Walter Jones, who had been standing near Herbert Alexander, the alleged victim, at Feather's Texaco at the time the robbery is alleged to have occurred.

On December 7, 1967, the jury found defendant guilty of both Robbery and Assault with Dangerous Weapon. Following the entry of the jury verdict, Judge Corcoran

revoked defendant's personal bond and committed him to the District authorities for incarceration in the District of Columbia jail. On February 16, 1967, Judge Corcoran sentenced defendant to two to six years on each count, said sentences to run concurrently. Defendant has been incarcerated since December 7, 1967, and is now located at the Correctional Complex at Lorton, Virginia.

On December 19, 1967, the trial judge denied defendant's Motion for New Trial, one of the grounds for which was the denial of defendant's Motion to Suppress Evidence. On February 8, 1968, Judge Corcoran entered an order authorizing defendant to prosecute an appeal to the United States Court of Appeals for the District of Columbia Circuit in forma pauperis, and directing that a transcript of the trial proceedings be prepared at the expense of the United States for use on appeal.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

On September 8, 1967, defendant filed a Motion to Suppress Evidence stating that he was arrested and his premises searched after an illegal entry by the police without an announcement of their authority and purpose on the morning of April 27, 1967. Among the items sought to

be suppressed, enumerated in defendant's motion, were a loaded .22 calibre revolver and a holster taken from defendant's bedroom.

A pretrial hearing on defendant's motion was held before Judge McGarraghy on October 13, 1967. Defendant called two witnesses at the hearing. The first was his wife, Mrs. Beryl Sweetenburg. Mrs. Sweetenburg testified that early on the morning of April 27, 1967, she and her husband were getting ready to go to bed, and she had prepared a small snack for him and was sitting and talking with him at the dinette table as he was eating. (Tr. 5-6, 22-23).[1/] She testified that at approximately 3 a.m. there was a knock on the door (Tr. 6, 23). Not knowing who was seeking entrance, she went to the door and asked "Who is it?" A voice answered "It's Grover." (Tr. 6, 23-24). She testified that she recognized the voice as that of Grover Sharp (Tr. 6, 23-24), a friend of defendant who had been playing cards with defendant, his wife, and other guests at defendant's

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1/ When used in this section of Appellant's brief, the abbreviation "Tr." refers to the transcript of the pretrial hearing on defendant's Motion to Suppress Evidence In all other sections of Appellant's brief, this abbreviation refers to the transcript of the trial, unless otherwise indicated.

apartment that night (Tr. 4, 10, 13-14). Mrs. Sweetenburg testified that she heard no other voices in the hallway beyond the closed door (Tr. 7). She looked through the peephole in the door to confirm that Grover Sharp was standing outside (Tr. 7, 24). The police apparently hid in the hallway so that they could not be seen from within defendant's apartment, for Mrs. Sweetenburg testified that she saw Sharp, but did not see anyone else standing in the hallway (Tr. 7, 24). As she opened the door for Grover, four men dressed in civilian clothes immediately entered the apartment (Tr. 7-8, 25-26). There was, as she testified, virtually no interval between the opening of the door and the entry of the four plainclothesmen (Tr. 8-9, 26). Sharp was left standing in the doorway (Tr. 26). Mrs. Sweetenburg testified that the men said nothing to anyone as they entered (Tr. 8, 28-29).

On cross-examination, Mrs. Sweetenburg testified that after the four men in civilian clothes had entered her apartment immediately upon her opening of the door, they went "straight back" to where defendant was sitting at the dinette table and began questioning him (Tr. 27). At no point before they began questioning

defendant did they identify themselves or state why they were in the apartment. (Tr. 28-29). Nor did Grover Sharp reveal to Mrs. Sweetenburg the identity of the men and the purpose of their entry (Tr. 26-27). Defendant repeatedly asked the men what they wanted and who they were, but they failed to identify themselves until they had questioned defendant at length at the dinette table (Tr. 28-30). Mrs. Sweetenburg was specifically asked on cross-examination if she heard these men identify themselves as police officers, and she stated that she did not until they had questioned her husband for a number of minutes inside the apartment (Tr. 28-29). Mrs. Sweetenburg testified that during this questioning, one of the plainclothesmen came from the dinette into the front room and began questioning her, but at no point did he state his identity or his purpose for being in the apartment (Tr. 28, 29, 30).

The second witness called by defendant was Grover Sharp, Jr., who had been at defendant's apartment playing cards earlier in the evening (Tr. 34). Sharp testified that he left defendant's apartment some time between 2 and 3 a.m. on April 27, 1967, and went home (Tr. 34-35, 45). When he arrived at his house, there

were several police officers waiting outside for him (Tr. 35, 45-46). As soon as he had stepped out of his car, they searched him and asked him where he had been that evening (Tr. 35,46). When Sharp told them that he had been at defendant's apartment (Tr. 35, 46), they asked him for defendant's address and told him to get into a squad car with them to return to the apartment (Tr. 36-37, 49). When they reached the building in which defendant's apartment was located, Sharp was accompanied by several of the officers up the stairs to the landing outside the door to the apartment (Tr. 37-38, 49). As they approached the apartment door, the officers asked Sharp to "knock on the door and ask for Lewis" (Tr. 38, 49). Sharp testified that he did knock on the door and heard defendant's wife respond by asking "Who is it?" (Tr. 38, 51). Sharp testified that he answered "It's Grover" (Tr. 38, 39, 51). Mrs. Sweetenburg then opened the door (Tr. 39, 51). Sharp testified that "Mrs Sweetenburg opened the door, and the officers sort of shoved me aside and rushed on in" (Tr. 40). At this point, Sharp was still outside the apartment in the hallway, where he remained for several minutes before entering with the remaining officers who were standing on the landing (Tr. 40).

On cross-examination, Sharp repeated that "The police just pushed me out of the way and went in" (Tr. 51). When asked on cross-examination whether the police officers brushed past him when the door was open, Sharp responded "Yes" (Tr. 52). When asked again "Is that correct?", Sharp responded "Yes" (Tr. 52). Mr. Sharp was later called by the Government to testify as a witness at the trial of defendant on December 7, 1967.

The Government called no witnesses at the pretrial hearing on defendant's Motion to Suppress Evidence to refute the testimony of the witnesses called by defendant. Judge McGarraghy denied defendant's motion, stating no grounds for his denial (Tr. 55).

Defendant's case came on for trial on December 6, 1967. Prior to the Government's opening statement, defendant's attorney timely renewed defendant's Motion to Suppress Evidence. The trial judge (Corcoran, J.) denied the motion without a hearing solely on the basis of the prior ruling by Judge McGarraghy, but defendant's objection to the denial was noted on the record (Excerpt Tr. 2).

SUMMARY OF THE ARGUMENT

The law is well-established in the District of Columbia that officers of the Metropolitan Police Department cannot enter the home of a suspect without making known their identity and the purpose for which they seek entrance. Unless the officers make known their identity and purpose, the arrest and search which follow are unlawful and any evidence thus procured must be suppressed. In this case, it is clear that the Metropolitan Police entered defendant's apartment on the morning of April 27, 1967, and made an arrest and search incident to the entry. The police were not invited into defendant's apartment, and they stated neither their identity nor their purpose when they entered. The items seized during the search of the apartment included a loaded .22 calibre revolver and a holster. These items were put in evidence by the Government at trial, and they seriously prejudiced defendant's case before the jury. The United States District Court for the District of Columbia therefore erred in denying defendant's Motion to Suppress Evidence, and in denying defendant's Motion for New Trial based in part on the denial of his suppression motion.

ARGUMENT

A. The Court Erred in Denying Defendant's Motion to Suppress Evidence.

Defendant was arrested and his premises were searched early on the morning of April 27, 1967, after the Metropolitan Police had entered the premises without an announcement of their authority and purpose. The facts relating thereto have been previously stated.

Unless officers of the Metropolitan Police Department make known their identity and purpose upon seeking entrance to the home of a suspect, the arrest and search which follow are unlawful and any evidence procured thereby must be suppressed. This judicially-established rule for the District of Columbia was first stated in Accarino v. United States, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949). In Miller v. United States, 357 U.S. 301 (1958), a case which arose in the District of Columbia, the United States Supreme Court, in discussing 18 U.S.C. § 3109 (which deals with entry to execute a search warrant), stated that the requirements of this statute "are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia Circuit in Accarino v. United States . . . ."

357 U.S. at 306.[2/] Subsequent to Miller this Court has treated the requirements of its own judicially developed rule as being equivalent to the requirements of 18 U.S.C. § 3109. See, e.g., Hair v. United States, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961), Keiningham v. United States, 109 U.S. App. D.C. 272, 287 F.2d 126 (1960).

As stated in Miller, the rule applies whether the entry and subsequent arrest and search are made "by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant," 357 U.S. at 309, for as stated by this Court in Keiningham v. United States, supra, "it is inconceivable that less should be required of an officer acting without a warrant than is required of him under a valid warrant." 109 U.S. App. D.C. at 275, 287 F.2d at 129.

The rule has been interpreted to require a statement of both authority and purpose by the police,

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2/ 18 U.S.C. § 3109:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

and a statement of one without the other will not suffice. Miller v. United States, supra, Accarino v. United States, supra. See also United States v. Barrow, 212 F. Supp. 837 (E.D. Pa. 1962). It is clear that this announcement of authority and purpose by the police must take place before entry, and that a statement subsequent to the entry will not fulfill the requirements of the rule. Keiningham v. United States, supra, at 276, 130.

It has also been clear since this Court's decision in Keiningham that a forceful "breaking" is not necessary within the meaning of the judicially developed rule for the District of Columbia or 18 U.S.C. § 3109 to constitute an illegal entry where there has been no announcement by the police of their authority and purpose. Any entry without permission is illegal where there has been no such announcement. In Keiningham, this Court stated.

> ". . . the word 'break', as used in 18 U.S.C. § 3109, means 'enter without permission'. We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not result in a breaking of parts of the house." (Emphasis added.) 109 U.S. App. D C. at 276, 287 F.2d at 130.

Any distinction between a locked and an unlocked door was put to rest because "a person's right to privacy in his home . . . is governed by something more than the fortuitous circumstance of an unlocked door . . . ." 109 U.S. App. D.C. at 276, 287 F.2d at 130. This Court accordingly held in Keiningham that:

> ". . . the officers 'entered' 1108 when they passed through the door in the partition, and we decide these cases on the narrow ground that an announcement, at least, was required at that time." 109 U.S. App. D.C. at 276, 287 F.2d at 130.

In a recent decision by the United States Supreme Court, Sabbath v. United States, 36 U.S.L.W. 4502 (U.S. June 4, 1968), the Court stated:

> "Considering the purposes of § 3109, it would indeed be a 'grudging application' to hold, as the Government urges, that the use of 'force' is an indispensable element of the statute. To be sure, the statute uses the phrase 'break open' and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law . . . . An unannounced intrusion into a dwelling -- what § 3109 basically proscribes -- is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a pass key, or, as here, open a closed but unlocked door." (Emphasis added). 36 U.S.L.W. at 4503.

The Court then cited with approval this Court's discussion of this issue in Keiningham. 36 U.S.L.W. at 4503.

Nor is the rule limited to instances in which the police themselves, with or without force, open a closed door to gain admittance. It also clearly applies to situations where the door is opened under the mistaken impression that someone other than a police officer seeks admittance, and where the person opening the door has no knowledge of the presence, identity and purpose of the police and does not invite them to enter.

In Gatewood v. United States, 93 U.S. App. D.C. 226, 209 F.2d 789 (1953), this Court held that an entry gained through falsehood on the part of arresting officers was illegal. In that case, when the officers had knocked on the door and had been asked who was there, they answered "From Western Union." Gatewood opened the door, saw the police, and unsuccessfully attempted to close it. Only after the police had forced their way into his apartment did they announce their purpose. In this case the mere fact that the door was opened by someone other than the police, as opposed to the police officers themselves, was determined not to be of significance and this Court determined that the police had made an illegal entry.

The majority opinion of the Court in Jones v. United States, 113 U.S. App. D.C. 14, 304 F.2d 381, cert. denied, 371 U.S. 852 (1962), does not aid the Government in this case. In Jones, detectives summoned the janitor of the building in which the defendant lived, informed him that they had a search warrant, and directed him to knock on defendant's door. He knocked on the door as commanded, and the defendant asked who was there. The detectives remained silent and the janitor replied, as instructed, "Janitor." The defendant opened the door three or four inches on a night chain, at which point a detective thrust his badge (authority) through the opening and said "I have a search warrant." (purpose). Defendant tried to flee, and the police broke into the apartment and apprehended him. This Court held 5-4 that the entry in Jones was legal.[3/]

3/ Judge Edgerton was joined by three other judges in a strong dissent in Jones. Discussing the use of trickery by the police to gain admittance to Jones' apartment, he stated:

> "The officer could have entered without subterfuge, but he chose not to do so. The premise that an entry by simply breaking in, after giving the necessary notice and being refused admittance, would have been legal is correct. But it does not support the conclusion that breaking in with the aid of subterfuge was legal.

(Cont'd. on next page)

The decision in Jones is not applicable in this case, for in Jones the police simply used trickery to get the door open far enough to allow them to announce their authority and purpose. The opinion of this Court was careful to point out that an announcement of both authority and purpose took place before the entry by the police. In this case, trickery of the same nature was employed to gain entry. Grover Sharp was commanded by the police to knock on defendant's apartment door and to ask for defendant. The police apparently hid in the

(Fn. cont'd. from preceding page):

> Moreover, the officer might have been admitted without any breaking in if he had simply announced his authority and purpose." 113 U.S. App. D.C. at 20, 304 F.2d at 387.

Judge Edgerton pointed out that Supreme Court cases sanctioning "artifice and strategem" were entrapment cases which did not involve the seizure of tangible property and violation of a constitutional right. The dissent argued that if 18 U.S.C. § 3109 were construed to allow entry by strategem, then a constitutional issue would be raised, since in Gouled v. United States, 255 U.S. 298 (1921), the Supreme Court held that a search and seizure of tangible property following an entry obtained by stealth violated the Fourth Amendment. He went on to say:

> "I think it unnecessary to decide whether the search and seizure were unreasonable. I think we should avoid that constitutional question by interpreting the statute as not intending to authorize the use of stealth or subterfuge in aid of entry . . . ." 113 U.S. App. D.C. at 20, 304 F.2d at 387.

hallway so that they could not be seen from within defendant's apartment, for Mrs. Sweetenburg testified that she saw only Grover Sharp when she looked through the peephole in the door. When the door was opened for Sharp, the police pushed Sharp aside and rushed into the apartment. In this case, unlike Jones, the police never announced their authority and purpose before they burst into defendant's apartment. Their failure to do so was inexcusable, particularly in light of their obvious opportunity to make such an announcement. Defendant's wife opened the door for Grover Sharp, not the police, and even if the police could then have gained admittance legally after stating their authority and purpose, they were not invited in and should not have entered of their own accord without making the required announcement.

In Miller v. United States, the Supreme Court recognized that an announcement might be a "useless gesture" and need not be given if the defendant were "virtually certain" of the authority of the police and the purpose of their presence. 357 U.S. at 310. In this case, it is clear that the "virtual certainty" exception to the rule does not apply. The police were dressed in civilian clothes and did not pursue defendant into his

apartment. In fact, defendant obviously never saw the police officers until they were inside the door to his apartment.

It is clear on the facts and applicable law that the police made an illegal entry into defendant's apartment on the morning of April 27, 1967, and defendant's motion to suppress the evidence obtained thereby should have been granted.

B. The Denial of Defendant's Motion to Suppress Evidence Was Clearly Prejudicial.

Subsequent to the denial of defendant's Motion to Suppress Evidence at the pretrial hearing held on October 13, 1967, the motion was timely renewed at trial and denied without a hearing by the trial judge (Corcoran, J.). Defendant's exception to this denial was noted on the record. The denial of defendant's suppression motion at both the pretrial hearing and the trial was clearly prejudicial. A gun found in defendant's bedroom closet incident to the illegal entry and search was alleged by the Government to be the weapon with which defendant committed robbery and assault with a dangerous weapon; he was convicted on both counts. The gun was shown to the jury and identified by the victim, Herbert Alexander,

as the weapon used in the alleged commission of both crimes (Tr. 18-19). Much of the testimony at trial concerned this weapon. Alexander, the alleged victim of the robbery and assault, testified that defendant put a small .22 calibre revolver beside his head when he allegedly committed the offenses for which he was convicted (Tr. 9-11). Discussion of the use of the gun in the commission of these offenses was spread through the testimony of Alexander, the alleged victim (Tr. 9-11, 13, 15-16, 18-19, 22, 23, 33-34, 35). The circumstances surrounding the seizure of the gun in defendant's apartment were testified to by Detective Raymond L. Ruffing (Tr. 84-85, 90-91), and Grover Sharp (Tr. 66-68), also called by the Government at trial.

The trial court should therefore have granted defendant's Motion for New Trial, one of the grounds for which was the denial of defendant's Motion to Suppress Evidence.

CONCLUSION

Defendant's Motion to Suppress Evidence should be granted, defendant's conviction on both counts, Robbery

(22 D.C.C. § 2901) and Assault with Dangerous Weapon (22 D.C.C. § 502), reversed, and defendant should be granted a new trial.

Respectfully submitted,

ALFRED H. MOSES

CHRISTOPHER H. BUCKLEY, JR.

701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant
(Appointed by this Court)

August 22, 1968